3. The State next suggests that the MinnesotaCare tax comports with the dormant Commerce Clause's nondiscrimination requirement because it does not draw an "express" geographic-based distinction between revenue generated from in-state customers and revenue received from out-of-state customers. This argument disregards the well-established rule that this Court "consider[s] not the formal language of the tax statute but rather its practical effect" when evaluating the constitutionality of a state tax under the dormant Commerce Clause. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

This Court has repeatedly invalidated—as facially discriminatory—taxes that were *not* framed in express geographic terms. *See, e.g., Tyler Pipe Indus., Inc.*, 483 U.S. at 237 n.8; *Armco Inc.*, 467 U.S. at 640 n.3. In its briefing here and below, the State has explicitly acknowledged that, *in operation*, the MinnesotaCare tax distinguishes between revenue that Mayo receives from in-state and out-of-state customers. Opp. 3; Opp. App. 28a-29a. Indeed, when Mayo submitted tax returns that claimed the exemption for all of its gross receipts, the State disallowed the exemption for what it described as Mayo's "*non-Minnesota receipts*." Opp. App. 27a (emphasis added). Because, as even the State itself recognizes, the "practical effect" of the MinnesotaCare tax's exemption provision is to require Mayo to pay the tax on revenue received from out-of-state customers but not on revenue generated from in-state customers (Opp. 16), the tax facially discriminates against interstate commerce. The Commerce Clause does not afford a safe harbor in which States are free to enact discriminatory tax legislation as long as they employ the simple artifice of avoiding express geographic-based tax distinctions in their tax codes.

[Footnote continued from previous page]

though the State also offered other property tax exemptions that were nondiscriminatory).

4. Finally, the State seeks to reconcile the decision below with this Court's precedents by suggesting that the MinnesotaCare tax's "credit" provision alleviates the tax's dormant Commerce Clause shortcomings. Minn. Stat. § 295.54 subd. 1. That credit has nothing to do with this case or with the facial discrimination claim presented by the petition. As construed by the Minnesota Supreme Court, the credit provision entitles Mayo's out-of-state customers to a refund of any MinnesotaCare tax payments that Mayo passes through to them. Pet. App. 26a-27a. The availability of that credit in no way, shape, or form alters the fact that Mayo is taxed on the revenue that it receives from out-of-state customers but *not* on the revenue it generates from in-state customers, and that Minnesota is taxing Mayo's business "more heavily when it crosses state lines than when it occurs entirely within the State." *Tyler Pipe Indus., Inc.*, 483 U.S. at 241.

Indeed, not even the *Minnesota Supreme Court* suggested that the credit provision saved the MinnesotaCare tax from invalidation on facial discrimination grounds—its rejection of Mayo's facial discrimination argument was instead premised *entirely* upon this Court's now-discredited decisions in *Kidd* and *Darnell*. Pet. App. 13a. The State's opposition erroneously conflates internal consistency and facial discrimination. Opp. 22-23. The concept of internal consistency refers to whether a State is taxing more than its fair share of an interstate transaction (*Jefferson Lines, Inc.*, 514 U.S. at 185) and is analytically distinct from whether a State is discriminating against interstate commerce by placing greater burdens on interstate transactions than on in-state transactions. The existence of *either* facial discrimination *or* internal inconsistency is sufficient in itself to render a tax invalid under the dormant Commerce Clause. *See Complete Auto Transit, Inc.*, 430 U.S. at 279. Indeed, this Court previously has granted review to consider *solely* the question of facial discrimination. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997). And that important question is directly and squarely presented by this case.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THREE OTHER STATE SUPREME COURTS.

Respondent also attempts to distinguish the decisions from other States that conflict with the decision below on the ground that the taxes at issue in those cases pertained to income or personal property taxes rather than health-care gross-receipts taxes. *Compare* Pet. 20, *with* Opp. 24. At a granular level, of course, any case can be distinguished from any other case by some fact or another. Mayo readily concedes that no other state court has considered the constitutionality of the MinnesotaCare tax, and none probably ever will. But the interpretation of the Commerce Clause adopted by the other state courts that have addressed tax regimes with exemptions for third-party payment of taxes directly conflicts with the Minnesota Supreme Court's analysis below. The superficial distinctions the State seeks to draw cannot obscure the fact that the Minnesota Supreme Court's interpretation of the dormant Commerce Clause is *impossible* to reconcile with these decisions.

The taxes invalidated in *St. Ledger v. Commonwealth*, 942 S.W.2d 893 (Ky. 1997), *D.D.I., Inc. v. State*, 657 N.W.2d 228 (N.D. 2003), *Annenberg v. Commonwealth*, 757 A.2d 338 (Pa. 2000), and *Farmer Bros. v. Franchise Tax Board*, 134 Cal. Rptr. 2d 390 (Ct. App. 2003), shared a common defect: Each provided exemptions for stockholders or dividend recipients where the issuing corporation paid in-state taxes but failed to afford an exemption where the corporation paid a comparable tax to another State. In other words, each State conditioned the tax liability of an individual taxpayer on whether a *third party* (*i.e.*, the corporation) had already paid a certain tax to the State. The MinnesotaCare tax is structurally identical to these taxes because it conditions Mayo's tax liability on whether a third party (*i.e.*, Mayo's customer) pays the MinnesotaCare tax itself. The California, Kentucky, North Dakota, and Pennsylvania courts *all* recognized that the failure to provide a parallel exemption for *out-of-state* tax payments by the third party constitutes

discrimination against interstate commerce. *St. Ledger*, 942 S.W.2d at 896; *D.D.I., Inc.*, 657 N.W.2d at 234; *Annenberg*, 757 A.2d at 336; *Farmer Bros.*, 134 Cal. Rptr. 2d at 398. Yet the Minnesota Supreme Court—relying on *Kidd* and *Darnell*—held that a State *can* extend a tax credit for the payment of an in-state tax without also doing so for payment of a parallel out-of-state tax. That decision squarely conflicts with the decisions of other state supreme courts, and this Court's review is necessary to resolve that conflict. As the petition demonstrated, the third-party-exemption question that *Jefferson Lines* expressly reserved requires a decisive answer from this Court. *See* 514 U.S. at 192 n.6 ("We express no opinion on the need for equal treatment when a credit is allowed for payment of in- or out-of-state taxes by a third party.").

III. THE STATE'S ATTEMPT TO DEFEAT REVIEW ON THE GROUND THAT THE RECORD IS UNDERDEVELOPED LACKS MERIT.

Finally, the State contends that review is ill-advised because the record is not "adequately developed" (Opp. 14) in that it does not contain evidence regarding the magnitude of the MinnesotaCare tax's impact on interstate commerce. That is no reason to deny review in this case.

Time and again, this Court has held that an actual discriminatory effect need *not* be shown to invalidate a tax on facial discrimination grounds. "Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 342 (1992). In *Armco*, 467 U.S. 638, for example, this Court rejected the State of West Virginia's contention that a plaintiff challenging a facially discriminatory wholesale tax "should [be] require[d] . . . to prove actual discriminatory impact on it." *Id.* at 644. The Court declared that "[t]his is *not* the test," and explained that no proof of discriminatory impact is necessary to state a valid facial discrimination claim. *Id.* (emphasis added). In *Fulton*, this

Court reiterated that a facially discriminatory tax is "virtually *per se* invalid" and that *no* actual discriminatory impact need be demonstrated. 516 U.S. at 331 (internal quotation marks omitted). The extensive factual record the State suggests is mandatory is in fact irrelevant under this Court's precedents.

In any event, even if an inquiry into the impact of the tax were required (which it is not), the record in this case is more than adequate to evaluate whether the MinnesotaCare tax has a discriminatory effect on interstate commerce. By taxing the revenue that Mayo receives from out-of-state customers but not from in-state customers, the MinnesotaCare tax incentivizes Mayo to devote its business to in-state customers, thereby discriminating against out-of-state medical providers seeking to do business with Mayo. Opp. App. 28a-29a. That discriminatory effect—on services as important as the medical laboratory testing conducted in affiliation with the world-renowned Mayo Clinic—is precisely the evil targeted by the dormant Commerce Clause's nondiscrimination requirement, which forbids a State from "discourag[ing] domestic corporations from plying their trades in interstate commerce" (*Fulton Corp.*, 516 U.S. at 333) and from adopting "protectionis[t] . . . attempts to give local consumers an advantage over consumers in other States." *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 577-78 (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[5]

Respectfully submitted.

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[5] This Court has asked the parties in *Daimler-Chrysler Corp. v. Cuno* (No. 04-1704) and *Wilkins v. Cuno* (No. 04-1724) to address whether respondents have standing. Plenary review in this case is warranted whatever the disposition in *Cuno*, but if this Court were to dismiss *Cuno* on standing grounds, this case would present the ideal replacement vehicle for addressing the interplay between the dormant Commerce Clause and preferential in-state tax exemptions.

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January 10, 2006